E X H I B I T A

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL No. 938

Introduced by Assemblyman Goggin

March 15, 1977

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE

An act to amend Sections 859b and 861 of, and to add Section 861 to, the Penal Code, relating to trials.

LEGISLATIVE COUNSEL'S DIGEST

AB 938, as introduced, Goggin (Crim.J.). Preliminary examination and trial.

Existing law provides that a defendant in custody, unless he waives the right, has the right to have the preliminary examination within 10 court days of the date he is arraigned or pleads, whichever is later.

This bill would permit the district attorney to request the preliminary examination to be held within 10 court days of the date [illegible] is arraigned or pleads, whichever is later.

Existing law provides that the [illegible] of the preliminary examination cannot be for more than 5 days at a time or 6 days total unless by consent or on motion of the defendant.

This bill would require that the consent or motion to postpone be made by all parties.

Existing statutory law and constitutional law provide that a defendant has the right to a speedy trial and statutory law provides for dismissal of criminal actions which are not brought to trial within specified time limits.

This bill would provide that the people shall have the right to a speedy trial and that the people may request the trial of a defendant to begin within 60 days of the date of arraign-

ment. The bill would further provide that a continuance may be granted only for good cause and only for a period of 10 court days.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 859b of the Penal Code is amended to read:

859b. At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, must set a time for the examination of the case and must allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. He must also issue subpoenas, subscribed by him, for witnesses within the state, required either by the prosecution or the defense. Unless the defendant waives the right, the defendant if he is in custody shall have the right to preliminary examination within 10 court days of the date he is arraigned or pleads, whichever occurs later.

The district attorney may request that the preliminary examination be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later. Any continuance beyond the 10-day period shall be in accordance with Section 861.

SEC. 2. Section 861 of the Penal Code is amended to read:

861. ~~If 15 days~~ The examination must be completed at one session, unless the magistrate, for good cause shown by affidavit, postpone it. The postponement cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of ~~the defendant~~ *all parties.*

SEC. 3. Section 931 is added to the Penal Code, to read:

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991. The people shall have the right to a speedy trial. The people may request that the trial of the defendant begin within 60 days of the date of arraignment. Any continuance beyond 60 days of the date of arraignment shall be granted only for good cause and only for a period of 10 court days.

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AMENDED IN ASSEMBLY MAY 9, 1977

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL No. 938

Introduced by Assemblyman Goggin

March 15, 1977

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE

An act to ~~amend Sections 859b and 861 of, and to add Section 931 to, the Penal Code, relating to trials.~~ *add Article 13 (commencing with Section 6191) to Chapter 4 of Division 3 of the Business and Professions Code, and to amend Section 987 of, and to add Section 987.9 to, the Penal Code, relating to attorneys, and making an appropriation therefor.*

LEGISLATIVE COUNSEL'S DIGEST

AB 938, as amended, Goggin (Crim. J.). *Counsel in capital cases: investigation funds.* ~~Preliminary examination and trial.~~

Existing law provides for the assignment of counsel in capital cases.

This bill would require the State Bar of California to prepare a list of criminal defense attorneys specially qualified to represent a defendant in a capital case. The bill would require the State Bar to promulgate regulations, as specified, with respect to such defense attorneys. Only an attorney appearing on the list could be appointed by the court to represent a defendant in a capital case.

This bill would provide for payment of investigators, experts, and others for the preparation or presentation of the defense of indigent defendants in capital cases.

The bill would also appropriate $1,100,000 from the General

Fund, to be allocated in specified amounts for these purposes.

~~Existing law provides that a defendant in custody, unless he waives the right, has the right to have the preliminary examination within 10 court days of the date he is arraigned or pleads, whichever is later.~~

~~This bill would permit the district attorney to request the preliminary examination to be held within 10 court days of the date the defendant is arraigned or pleads, whichever is later.~~

~~Existing law provides that the postponement of the preliminary examination cannot be for more than 2 days at a time or 6 days total unless by consent or on motion of the defendant.~~

~~This bill would require that the consent or motion to postpone be made by all parties.~~

~~Existing statutory law and constitutional law provide that a defendant has the right to a speedy trial and statutory law provides for dismissal of criminal actions which are not brought to trial within specified time limits.~~

~~This bill would provide that the people shall have the right to a speedy trial and that the people may request the trial of a defendant to begin within 60 days of the date of arraignment. The bill would further provide that a continuance may be granted only for good cause and only for a period of 10 court days.~~

Vote: ~~majority~~ ⅔. Appropriation: ~~no~~ *yes*. Fiscal committee: ~~no~~ *yes*. State-mandated local program: ~~no~~ *yes*.

The people of the State of California do enact as follows:

~~SECTION 1. Section 859b of the Penal Code is amended to read:~~

~~859b. At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, must set a time for the examination of the case and must allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the~~

~~examination. He must also issue subpoenas, subscribed by him, for witnesses within the state required either by the prosecution or the defense. Unless the defendant waives the right, the defendant if he is in custody shall have the right to preliminary examination within 10 court days of the date he is arraigned or pleads, whichever occurs later.~~

~~The district attorney may request that the preliminary examination be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later. Any continuance beyond the 10-day period shall be in accordance with Section 682.~~

~~SEC. 6. Section 682 of the Penal Code is amended to read:~~

~~682. The examination must be completed at one session, unless the magistrate, for good cause shown by affidavit, postpone it. The postponement cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of all parties.~~

~~SEC. 7. Section 686.1 is added to the Penal Code, to read:~~

~~686.1. The people shall have the right to a speedy trial. The people may request that the trial of the defendant begin within 60 days of the date of arraignment. Any continuance beyond 60 days of the date of arraignment shall be granted only for good cause and only for a period of 10 court days.~~

SECTION 1. Article 13 (commencing with Section 6191) is added to Chapter 4 of Division 3 of the Business and Professions Code, to read:

Article 13. Eligibility of Attorneys to Represent Defendants in Capital Cases

6191. (a) The State Bar shall prepare a list of criminal defense attorneys specially qualified to represent a defendant in a capital case and shall distribute such list to every trial court where a capital case is pending. Such list shall be reviewed and updated on an annual basis.

(b) In complying with subdivision (a), the State Bar shall promulgate appropriate regulations, including but not limited to the following:

(1) Eligibility criteria shall be developed to identify criminal attorneys who are specially qualified to represent a defendant in a capital case.

(2) Criminal defense attorneys shall be considered for inclusion on the list established under this section based on individual application to the State Bar.

(3) It shall be incumbent upon the trial court judge who must assign counsel in a capital case to request from the State Bar the list of attorneys established under this section.

(4) No attorney, including a local public defender, shall be appointed by the court unless the attorney's name appears on the list established under this section.

6192. The State Bar may delegate the duties and responsibilities set out in Section 6191 to an affiliated bar association whose membership is limited to attorneys specializing in the defense of criminal cases.

SEC. 2. Section 987 of the Penal Code is amended to read:

987. (a) In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assitance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him.

(b) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him that he must be represented by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at a public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned to him, *pursuant to Section 6191 of the Business and Professions Code*, and allow him a reasonable time to send for his chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him *pursuant to Section 6191 of the Business and Professions Code*. If the defendant is able to employ

counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to ~~him~~ *him pursuant to Section 6191 of the Business and Professions Code.*

SEC. 3. Section 987.9 is added to the Penal Code, to read:

987.9. In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. Upon receipt of such application, the court shall disburse the amount requested to the defendant's attorney.

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all monies received and disbursed pursuant to this section.

SEC. 4. The sum of one million one hundred thousand dollars ($1,100,000) is hereby appropriated from the General Fund, to be allocated according to the following schedule:

(a) One million dollars ($1,000,000) to the State Controller for allocation and disbursement to local agencies pursuant to Section 2231 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.

(b) One hundred thousand dollars ($100,000), without regard to fiscal years, to the State Bar to enable the performance of the duties specified in Section 6191 of the Business and Professions Code.

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AMENDED IN ASSEMBLY MAY 19, 1977

AMENDED IN ASSEMBLY MAY 9, 1977

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL No. 938

Introduced by Assemblyman Goggin
(Principal Coauthor: Senator Deukmejian)

March 15, 1977

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE

An act to add ~~Article 13 (commencing with Section 6101) to Chapter 4 of Division 3 of the Business and Professions Code, and to amend Section 987 of,~~ and to add Section 987.9 to, the Penal Code, relating ~~to attorneys,~~ *to investigation funds*, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 938, as amended, Goggin (Crim. J.). ~~Counsel in capital~~ *Capital* cases: investigation funds.

Existing law provides for the assignment of counsel in capital ~~cases.~~ *cases and for the employment of counsel at public expense if the defendant is unable to employ counsel.*

~~This bill would require the State Bar of California to prepare a list of criminal defense attorneys specially examined to represent a defendant in a capital case. The bill would require the State Bar to promulgate regulations, as specified, with respect to such defense attorneys. Only an attorney appearing on the list could be appointed by the court to represent a defendant in a capital case.~~

This bill would provide for payment of investigators, ex-

perts, and others for the preparation or presentation of the defense of indigent defendants in capital cases.

The bill would ~~also~~ appropriate ~~$1,109,033~~ *$1,000,000* from the General ~~Fund, to be allocated in specified amounts for these purposes.~~ *Fund to the State Controller for allocation and disbursement to local agencies.*

Vote: ⅔. Appropriation: yes. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

~~SECTION 1. Article 13 (commencing with Section 6101) is added to Chapter 4 of Division 3 of the Business and Professions Code, to read:~~

~~Article 13. Eligibility of Attorneys to Represent Defendants in Capital Cases~~

~~6101. (a) The State Bar shall prepare a list of criminal defense attorneys specially qualified to represent a defendant in a capital case and shall distribute such list to every trial court where a capital case is pending. Such list shall be reviewed and updated on an annual basis.~~

~~(b) In complying with subdivision (a), the State Bar shall promulgate appropriate regulations including but not limited to the following:~~

~~(1) Eligibility criteria shall be developed to identify criminal attorneys who are specially qualified to represent a defendant in a capital case.~~

~~(2) Criminal defense attorneys shall be considered for inclusion on the list established under this section based on individual application to the State Bar.~~

~~(3) It shall be incumbent upon the trial court judge who must assign counsel in a capital case to request from the State Bar the list of attorneys established under this section.~~

~~(4) No attorney, including a local public defender, shall be appointed by the court unless the attorney's name appears on the list established under this section.~~

~~6102. The State Bar may delegate the duties and~~

~~responsibilities set out in Section 6125 to an affiliated bar association whose membership is limited to attorneys specializing in the defense of criminal cases.~~

~~SEC. 5. Section 987 of the Penal Code is amended to read:~~

~~987. (a) In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him.~~

~~(b) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him that he must be represented by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel. Inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned to him pursuant to Section 6125 of the Business and Professions Code, and allow him a reasonable time to send for his chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him pursuant to Section 6125 of the Business and Professions Code. If the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to him pursuant to Section 6125 of the Business and Professions Code.~~

~~SEC. 6.~~ *SECTION 1.* Section 987.9 is added to the Penal Code, to read:

987.9. In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the

defense. Upon receipt of such application, ~~the court shall disburse the amount requested to the defendant's attorney.~~ *a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.*

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

~~SEC. 4. The sum of one million one hundred thousand~~

SEC. 2. The sum of one million dollars ~~($1,100,000)~~ *($1,000,000)* is hereby appropriated from the ~~General~~ Fund, ~~to be allocated according to the following schedule:~~

~~(a)~~ ~~One million dollars ($1,000,000)~~ ~~to the State~~ *General Fund to the State* Controller for allocation and disbursement to local agencies pursuant to Section 2231 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.

~~One hundred thousand dollars ($100,000), without regard to fiscal years, to the State Bar to enable the performance of the duties specified in Section 6001 of the Business and Professions Code.~~

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AMENDED IN SENATE AUGUST 11, 1977

AMENDED IN ASSEMBLY MAY 19, 1977

AMENDED IN ASSEMBLY MAY 9, 1977

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL No. 938

Introduced by ~~Assemblyman Goggin~~ *Assemblymen Goggin and Wornum*
(Principal Coauthor: Senator Deukmejian)

March 15, 1977

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE

An act to add Section 987.9 to, the Penal Code, relating to investigation funds, ~~and making an appropriation therefor.~~ *making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.*

LEGISLATIVE COUNSEL'S DIGEST

AB 938, as amended, Goggin. (Crim. J.). Capital cases: investigation funds.

Existing law provides for the assignment of counsel in capital cases and for the employment of counsel at public expense if the defendant is unable to employ counsel.

This bill would provide for payment of investigators, experts, and others for the preparation or presentation of the defense of indigent defendants in capital cases.

The bill would appropriate $1,000,000 from the General Fund to the State Controller for allocation and disbursement to local agencies.

This bill would take effect immediately as an urgency stat-

e, but would be operative only if SB 155 is chaptered.
Vote: ⅔. Appropriation: yes. Fiscal committee: yes. State-
andated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 987.9 is added to the Penal Code, to read:

987.9. In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. *The fact that such an application has been made shall be confidential and the contents of the application shall be confidential.* Upon receipt of such application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. *The ruling on the reasonableness of the request shall be made at an in camera hearing.* In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

SEC. 2. *This act shall become operative only if Senate Bill No. 155 of the 1977–78 Regular Session is chaptered.*

SEC. 3. The sum of one million dollars ($1,000,000) is hereby appropriated from the General Fund to the State Controller for allocation and disbursement to local agencies pursuant to Section 2201 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health,

or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies one aspect of the constitutional infirmities found to be in existing law; and in order to guarantee the public the protection inherent in an operative death penalty law, it is necessary that this act take effect immediately.

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Assembly Bill No. 938

Passed the Assembly September 9, 1977

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Chief Clerk of the Assembly

Passed the Senate September 8, 1977

_____

Secretary of the Senate

This bill was received by the Governor this _____ day of _____, 1977, at ____ o'clock ___ M.

_____

Private Secretary of the Governor

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CHAPTER____

An act to add Section 987.9 to, the Penal Code, relating to investigation funds, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 938, Goggin. Capital cases: investigation funds.

Existing law provides for the assignment of counsel in capital cases and for the employment of counsel at public expense if the defendant is unable to employ counsel.

This bill would provide for payment of investigators, experts, and others for the preparation or presentation of the defense of indigent defendants in capital cases.

The bill would appropriate $1,000,000 from the General Fund to the State Controller for allocation and disbursement to local agencies.

This bill would take effect immediately as an urgency statute, but would be operative only if SB 155 is chaptered.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 987.9 is added to the Penal Code, to read:

987.9. In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that such an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of such application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an

appropriate amount of money to defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

SEC. 2. This act shall become operative only if Senate Bill No. 155 of the 1977–78 Regular Session is chaptered.

SEC. 3. The sum of one million dollars ($1,000,000) is hereby appropriated from the General Fund to the State Controller for allocation and disbursement to local agencies pursuant to Section 2231 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies one aspect of the constitutional infirmities found to be in existing law, and in order to guarantee the public the protection inherent in an operative death penalty law, it is necessary that this act take effect immediately.

Approved _____, 1977

_____

Governor

Assembly Bill No. 938

CHAPTER 1048

An act to add Section 987.9 to, the Penal Code, relating to investigation funds, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 24, 1977. Filed with Secretary of State September 24, 1977.]

LEGISLATIVE COUNSEL'S DIGEST

AB 938, Goggin. Capital cases: investigation funds.

Existing law provides for the assignment of counsel in capital cases and for the employment of counsel at public expense if the defendant is unable to employ counsel.

This bill would provide for payment of investigators, experts, and others for the preparation or presentation of the defense of indigent defendants in capital cases.

The bill would appropriate $1,000,000 from the General Fund to the State Controller for allocation and disbursement to local agencies.

This bill would take effect immediately as an urgency statute, but would be operative only if SB 155 is chaptered.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 987.9 is added to the Penal Code, to read:

987.9. In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that such an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of such application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

SEC. 2. This act shall become operative only if Senate Bill No.

155 of the 1977–78 Regular Session is chaptered.

SEC. 3. The sum of one million dollars ($1,000,000) is hereby appropriated from the General Fund to the State Controller for allocation and disbursement to local agencies pursuant to Section 2231 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies one aspect of the constitutional infirmities found to be in existing law, and in order to guarantee the public the protection inherent in an operative death penalty law, it is necessary that this act take effect immediately.

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DECLARATION OF SERVICE BY MAIL

Re: MAURICE JOHN KEENAN v. SUPERIOR COURT (San Francisco) No. 24309

I, Priscilla Clarfield declare that I am over 18 years of age, and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102. I served a true copy of the attached

PETITION FOR REHEARING

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Honorable Arlo E. Smith, District Attorney
City & County of San Francisco
Hall of Justice
880 Bryant Street
San Francisco, California 94103

Honorable Carl M. Olsen, Clerk
City & County of San Francisco
Hall of Justice
880 Bryant Street, Room 316
San Francisco, California 94103

M. Gerald Schwartzbach
Attorney at Law
1779 Union Street
San Francisco, California 94125

Steven Diaz
Deputy City Attorney
City Hall
San Francisco, California 94102

1 copy Court of Appeal
(Hand delivered)

Each said envelope was then, on February 23, 1982 sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

Executed on February 23, 1982, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

Priscilla Clarfield
DECLARANT

APPENDIX E

ATTORNEY GENERAL--OFFICE COPY

No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

SUPREME COURT
FILED
MAY 21 1982
LAURENCE P. GILL, Clerk

Deputy

PETITION FOR REHEARING

GEORGE DEUKMEJIAN, Attorney General
of the State of California

ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General - Criminal Division

EDWARD P. O'BRIEN
Assistant Attorney General

WILLIAM D. STEIN
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San Francisco, California 94102
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Attorneys for Real Party in Interest

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art. VI, sec. 14	16

No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,	)
Petitioner,	)
vs.	)
SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,	)
Respondent,	)
THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Real Party in Interest.	)

PETITION FOR REHEARING

TO: THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rules 24(a) and 27 of the California Rules of Court, respondent Superior Court hereby petitions for rehearing of the Court's decision in this case as modified on May 6, 1982. Rehearing is necessary because the Court's modified opinion (1) is factually incorrect, internally inconsistent and unclear about the procedures to be employed when the trial courts of this State are asked to appoint defense counsel; (2) orders relief never sought by petitioner from respondent court; (3) creates a species of confidential proceedings not

authorized by law; and (4) grants a writ of mandate under circumstances in which respondent court could not have legally exercised its discretion other than as it did by denying funds for second counsel under Penal Code section 987.9. Accordingly, respondent court files this Petition for Rehearing.

ARGUMENT

I

MODIFICATION OF THE COURT'S JUDGMENT IN THIS CASE MAKES THIS PETITION FOR REHEARING TIMELY.

Rule 24(a) of the California Rules of Court states in pertinent part:

> "Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification."

Regarding the effect of a modification of an opinion before the judgment becomes final, and whether such modification starts a new time period before the opinion becomes final, Mr. Witkin states:

> "Under Rule 24(a), following

the prior case law, this depends on whether the court merely changes the legal discussion or affects the rights of the parties (e.g., by changing the amount of the recovery) . . . ."
Witkin, VI Cal. Proc., Appeal, § 512 at pp. 4461-4462.

The judgment of the original opinion in this case was:

"Let a peremptory writ of mandate issue directing respondent court to allocate reasonable funds to pay for a second attorney." Keenan v. Superior Court (1982) 30 Cal.3d 750, 759.

The judgment of the modified opinion now states:

"Let a peremptory writ of mandate issue directing respondent court to appoint a second attorney for defendant."
(Mod. Op. No. 9 at p. 4).

Thus, whereas respondent court was first ordered, pursuant to Penal Code section 987.9, to allocate reasonable funds to pay for a second defense attorney, that court now has been directed to appoint a second attorney for defendant without allocating any funds under section 987.9. Since this modification of the opinion not only changes the relief due petitioner, but also issues a new directive to respondent court, it is clear that there has been a modi-

fication of this Court's judgment. Hence this Petition for Rehearing is timely and authorized by law.

II

AS MODIFIED THIS COURT'S OPINION IS FACTUALLY INCORRECT, INTERNALLY INCONSISTENT, CONFUSING AND WRONGLY DECIDED.

Via the modified opinion, we have been officially informed for the first time that the Court heretofore "determined that the People should not be a real party in interest" (Mod. Op. No. 2 at p. 2), and that the Attorney General appears in this case as "amicus curiae" (Ibid.). To set the record straight, on February 23, 1982, the California Attorney General was substituted for the San Francisco City Attorney as attorney of record for the respondent superior court. Attached hereto as Exhibit A is a copy of the Notice of Substitution of Attorneys, which was filed in this case and served upon counsel for petitioner according to Rule 48 of the California Rules of Court. While the California Attorney General, of course, always appears before this Court as a friend of the Court, our appearance herein is as counsel for a party in this proceeding, and not as mistakenly stated in the modified opinion as an amicus curiae. The factually unfounded assertion about our status as counsel should be corrected.

Secondly, we question the authority by which the People have been, in effect, dismissed from this case

as the real party in interest. Code of Civil Procedure section 1107 authorizes a court, in its discretion and for good cause shown, to grant an application for a prerogative writ of mandate or prohibition ex parte and without notice or service of the application. Rule 56(b) of the California Rules of Court likewise permits a reviewing court, in its discretion, to allow the filing of a petition for writ of mandate or prohibition without service upon the real party in interest. Except for Penal Code section 987.9, no authority is cited in the Court's modified opinion for the proposition that a court can dismiss a real party in interest from a case. Yet, as is elsewhere recognized in the opinion as now modified, Penal Code section 987.9 does not provide for the appointment of counsel (Mod. Op. Nos. 4 and 8 at pp. 2-3 and 4). Since the only cited ground for determining that the People should not be a real party in interest, namely Penal Code section 987.9, has been held inapplicable to this case, there is no justification for the People's removal as the real party in interest. The determination that the People should not be a real party in interest, lacking any basis in law, is accordingly invalid. For the reasons already expressed in the first Petition for Rehearing at pp. 2-15, respondent submits that the People's right to due process of law, including notice and an opportunity to be heard, is violated by their secret dismissal from this proceeding.

The opinion of this Court as presently written is, moreover, internally inconsistent. The opinion still begins by stating that petitioner

> "seeks a writ of mandate to compel respondent superior court to grant his motion for public funds to pay for the services of a second attorney to assist in the preparation of his defense. He relies on Penal Code section 987.9 as authority for this request."
> Keenan v. Superior Court, supra, 30 Cal. 3d at 752; fn. omitted.

The very next sentence now states the Court's holding:

> "[W]e hold that the trial court abused its discretion in denying appointment of additional counsel but that the appointment should be made under section 987, subdivision (b), . . ."
> (Mod. Op. No. 1 at p. 1).

Something must be seriously wrong when a petitioner moves a court for funds to employ second counsel under a specific statute, i.e., Penal Code section 987.9; a judge of that court denies this request; the reviewing court later agrees that funds should not have been appropriated, and that appointment of counsel should have been requested under a different statute, i.e., Penal Code section 987(b); the reviewing court nevertheless holds that the lower

court abused its discretion by failing to do (a) what the petitioner never asked it to do and (b) what the reviewing court says it had no authority to do because the request for appointment of counsel should have been made before the trial court. The logic of such a progression is hard to discern, especially when it is recalled that under Code of Civil Procedure, section 1068:

> "A writ of review may be granted by any court, except a municipal or justice court, when an inferior tribunal, . . . exercising judicial functions, has exceeded the jurisdiction of such tribunal, ..."

According to the Court's modified opinion, respondent court could not have exceeded and did not exceed its jurisdiction when it denied petitioner's request for funds to employ a second attorney under Penal Code section 987.9. Rather, respondent court correctly and properly exercised that jurisdiction in the only legally permissible manner. The result in this case is certainly bizarre, for this Court simultaneously upholds respondent court's denial of funds under section 987.9, while finding that respondent court abused its discretion by failing to address the specific reasons advanced by petitioner's attorney in support of the motion seeking funds under that statute (Mod. Op. No. 7 at p. 4). If, as the Court now acknowledges, Penal Code section 987.9 is the wrong statute for seeking

appointments of counsel, then the respondent court, as a matter of law, could not have granted petitioner's request for funds to employ co-counsel regardless of the reasons advanced by petitioner.

> "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion."
>
> D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 19.

Concededly now, respondent court correctly exercised its jurisdiction because Penal Code section 987.9, the statute under which it was asked to act, has no application to appointments of counsel. Instead of holding that the trial court somehow erred, the onus should be placed upon petitioner for seeking relief before the wrong judge under the wrong statute.

Respondent court had but two choices at the time it denied petitioner's request for funds to employ another

attorney. The judge could have granted the request, or he could have denied it. The alternative now created by this Court, denying the request for money but ordering the appointment of counsel, was not an option available to the 987.9 judge. This is because Penal Code section 987.9 is very specific when it states that an application for funds to employ experts, investigators and others shall be made before ". . . a judge of the court, other than the trial judge presiding over the capital case in question, ..." Apparently, this Court now recognizes that requests for appointments of additional counsel are to be made to the trial court (Mod. Op. No. 1 at p. 1; No. 4 at p. 3). But, having recognized that petitioner should have made a request for appointment of co-counsel before the assigned trial court judge, this Court's decision in Williams v. Superior Court (1939) 14 Cal.2d 656, allows no other judge of the respondent superior court jurisdiction to appoint an additional defense attorney, except for the trial court judge.

> "[W]here a proceeding has been duly assigned for hearing and determination to one department of the superior court by the presiding judge of said court in conformity with the rules thereof, and the proceeding so assigned has not been finally disposed of therein or legally removed therefrom, it is beyond the juris-

dictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. [Citation]. In other words, while one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts." Id. at 662. Accord People v. Batchelor (1976) 56 Cal.App.3d 278, 284; In re Kowalski (1971) 21 Cal.App. 3d 67, 70; People v. Stuyvesant Ins. Co. (1968) 261 Cal.App.2d 773, 786; Thomasian v. Superior Court (1953) 122 Cal.App.2d 322, 332.

The 987.9 judge (in this case Judge Hanlon) would have unlawfully interfered with the power of the trial judge (in this case Judge Dandurand) had Judge Hanlon attempted to appoint additional counsel as this Court's opinion apparently now requires that he do. This Court's modified opinion wholly fails to distinguish between the authority of the section 987.9 judge to appropriate funds for specified purposes, versus that of the trial court judge to appoint counsel under section 987(b). Despite the specific delineation of authority

created by the Legislature, the Court's new opinion seems to group together the 987.9 judge with the trial court judge, as if they each could exercise their respective functions interchangeably. This commingling of the judges of respondent superior court is contrary to the express language of section 987.9, and constitutes a silent overruling of the law of this State as announced in Williams v. Superior Court, supra, which has since been consistently followed by the Courts of Appeal.

Confusion is also now engendered as to which judge is to hear motions for appointment of co-counsel in death penalty cases. Although dictum in the Court's modified opinion suggests that the motion should be made before the trial court judge under Penal Code section 987(b), the Court holds that the Penal Code section 987.9 judge erred by not making the appointment, despite the fact that section 987.9 does not provide for the appointment of counsel. The Court's holding is thus at odds with the ordinary procedures requiring that motions be made before the judge assigned to hear a case, as opposed to some other judge of the superior court. Furthermore, because the Court's holding is directed to the 987.9 judge, it would appear that the opinion is only advisory insofar as the trial court judge is concerned. The law on the matter of appointment of counsel should not be left in this unsettled state, with this Court suggesting that such motions should be heard by the judge assigned for trial,

while apparently mandating that a judge other than the trial court judge make the appointment of co-counsel.

In summary, and with all due respect, this Court's newly written opinion is a mishmash. A judge, asked by petitioner to allocate funds for a second defense attorney, has his decision denying that request reversed, even though this Court now holds that the judge had no statutory authority to grant the money for that purpose. And, contrary to precedent dating over 40 years, which specifically prohibits one judge from interfering with a case assigned to another judge of the same court, this Court seems to hold that Judge Hanlon abused his discretion by failing to intervene and appoint additional counsel in a case assigned to Judge Dandurand for trial. Since Judge Hanlon was neither asked nor authorized to appoint co-counsel for petitioner, respondent fails to see how that judge can be said to have abused his discretion when, under Auto Equity, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, that judge was bound by this Court's decision in Williams v. Superior Court, supra.

III

"CONFIDENTIAL" MOTIONS FOR APPOINTMENT OF COUNSEL ARE LEGALLY UNAUTHORIZED AND UNNECESSARY.

"By analogy" to Penal Code section 987.9, this Court's modified opinion now holds that a defense motion for co-counsel can be made "confidentially" (Mod. Op.

No. 4 at p. 3). The authority cited in support of this proposition is inapposite and no reason is given why the mere making of the motion should be a secret.

Two decisions, Puett v. Superior Court (1979) 96 Cal.App.3d 936, 940, fn. 2, and People v. Faxel (1979) 91 Cal.App.3d 327, 330, fn. 1, are cited in this Court's modified opinion as support for its conclusion that a defense counsel is entitled to make a "confidential" motion for appointment of a second attorney. As will be shown, neither case provides a basis for the Court's ruling.

In both Puett and Faxel, the defense motions for appointments of investigators were made in open court:

> "Defendant's motion was denominated a motion for an order appointing an investigator or alternatively approving investigative expenses. . . . [¶] The motion came on for hearing on April 16, two days before the scheduled preliminary hearing."
>
> Puett v. Superior Court, 96 Cal.App.3d, supra, at 940.

In Faxel, the court's opinion indicates only that on three occasions the defendant, appearing in pro per, sought the appointment of an investigator or runner. The opinion does not suggest, much less hold, that the motion could be made confidentially. Rather, what both

Puett and Faxel do state in the footnotes cited by this Court is that "the showing" on the defendants' motions could be made in camera in order to satisfy the requirements of Prudhomme v. Superior Court (1970) 2 Cal.3d 320. Puett v. Superior Court, 96 Cal.App.3d, supra, at 940, fn. 2; People v. Faxel, 91 Cal.App.3d, supra, at 330-331, fn. 1 (emphasis added).[1/] These cases implicitly acknowledge the distinction between a motion and a showing on such motion, whereas this Court's modification, again, groups the two together, apparently not recognizing that there is a difference.

Code of Civil Procedure section 1004 states:

> "Except as provided in section 166 of this code, motions must be made in the court in which the action is pending."

Section 166 of the Code of Civil Procedure, in turn, authorizes certain motions to be made "at chambers." A judge may

> "[g]rant all orders and writs which are usually granted in the first instance upon an ex parte application, and may

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1/ " To permit the defendant to make the required showing without unduly requiring the disclosure of his defense, the defendant may make his showing at an in camera hearing outside the presence of the prosecutor; however, a record of the proceedings in camera should be preserved so that the court's determination may be reviewed. (See People v. Faxel, supra, 91 Cal.App.3d at pp. 330-331, fn. 1.)" (Emphasis added.)

at chambers, hear and dispose of such orders and writs; . . . ."

The statute then goes on to list the sorts of matters which can be heard at chambers (Ibid.). Motions for appointment of counsel are not among the listed exceptions.

As this Court has previously held, "unless expressly authorized by statute, a judge cannot transact judicial business in chambers." Carpenter v. Nutter (1889) 127 Cal. 61, 64; Loomis v. Andrews (1874) 49 Cal. 239, 240; see Larco v. Casanueva (1866) 30 Cal. 560, 564; Code Comm's Notes to Code of Civil Proc., § 166.

> "In general, 'all judicial business must be transacted in court, and the authority to transact such business out of court is exceptional, and does not exist unless expressly authorized by statute.'" Richmond v. Shipman (1976) 63 Cal.App.3d 340, 343, quoting Shepherd v. Superior Court (1921) 54 Cal.App. 673, 676.

Penal Code section 987.9 expressly authorizes the making of confidential motions in camera; Penal Code section 987(b), the statute for appointing counsel, does not. Absent such legislative direction, respondent submits there is no authority allowing a motion for additional counsel to be made ex parte. See also, Mosk v. Superior Court (1979) 25 Cal.3d 474, 492-493, for its discussion

of authority permitting "confidential" as opposed to public proceedings.

In short, the two cases cited by this Court (Puett and Faxel, supra) provide no legal basis for the making of confidential motions seeking appointment of co-counsel. And, the Legislature has not otherwise authorized such motions to be made in camera.

Nor does this Court's modified opinion posit any reason why a motion for additional counsel (again as distinguished from the showing on the motion) should be confidential. No reasons have been put forth to justify the opinion's result in this respect. "Thus, the Constitution's command that '[d]ecisions . . . be in writing with reasons stated' has been disregarded." Olson v. Cory (1980) 27 Cal.3d 532, 571 (Newman, J. dissenting). No reason has been stated, we submit, because there is none. Respondent believes the Court would have to go to great lengths to explain why the making of a motion for co-counsel should be heard in confidence. How the prosecution gains any advantage by knowing about the motion's existence remains a mystery. Where this Court decides to carve out its own judicially-created exception for defense motions to be made in camera, the least the People can expect are reasons for the Court's decision. See Cal. Const., art. VI, sec. 14.

The reason, on the other hand, why such motions should be made in public session is obvious. In case the

defendant is convicted and claims incompetence of trial counsel as a ground for reversal, the record of any defense motion for co-counsel would be of manifest importance in defending trial counsel's performance. For this reason, following conviction, the People would, of necessity, require notice of any in camera proceedings. If the making of defense counsel's motion were itself confidential, then there would be no indication of record that trial counsel had ever moved for assistance. The very existence of any "confidential" defense motion for additional counsel would thus be unknown. This state of affairs can lead to potential mischief. Because there is no reason for keeping secret such a defense motion, and good reason for its being made in public, this Court's decision in this respect is without justification.

A final matter left unexplained by this Court's newly modified opinion is why appointments of additional counsel should be analogized to Penal Code section 987.9, which deals with funding for expert and investigative assistance. Since the Court has now recognized that the existing law aside from section 987.9 provides for counsel's appointment, that existing law should be controlling on the appointment of counsel, instead of section 987.9. When the statutory basis of section 987.9 is removed from this case, that section's trappings of confidentiality should not remain. The Legislature has not authorized any confidential motions for appointment of counsel;

this Court provides no reason why those motions should be made in confidence; it follows, therefore, that the confidential making of such motions is legally unauthorized and without justification.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that this Petition for Rehearing should be granted.

DATED: May 21, 1982

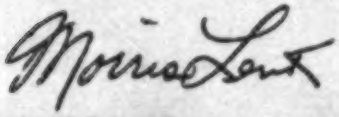
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